IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
At Wheeling

V. TAD GREENE, ON BEHALF
OF HIMSELF AND AS PERSONAL
REPRESENTATIVE OF C. G.,
AND ASHLEY L. GREENE,

Plaintiffs,

vs. Case No.: 5:10-CV-104 (FPS)

NATIONWIDE MUTUAL INSURANCE
COMPANY, AN OHIO CORPORATION,

Defendant.

RESPONSE TO PLAINTIFF'S MOTION TO REMAND AND REQUEST FOR ORAL ARGUMENT

I. INTRODUCTION

Defendant Nationwide Mutual Insurance Company ("Nationwide") submits this response to the motion to remand filed by Plaintiffs V. Tad Greene, individually and as personal representative of C. G., and Ashley L. Greene. The only issue raised in the motion to remand is whether the amount in controversy exceeds $75,000, exclusive of interest and costs. Manifestly, based the circumstances surrounding Nationwide's Offer of Judgment in the amount of $100,000.00, it does.

Following receipt of medical records and increased medical specials received through Plaintiffs' written discovery responses and the use of Plaintiffs' medical authorizations, Nationwide served via U.S. mail[1] an Offer of Judgment, pursuant to West Virginia Rule of Civil Procedure 68, in the amount of $100,000.00 on September 15, 2010. The time to accept the Offer of Judgment expired on or about September 30, 2010. In their motion, Plaintiffs do not contest that they received the Offer of Judgment, that they did not accept it, and that the ten (10) day deadline passed prior to Nationwide's Notice of Removal. Therefore, this Court should deny the motion to remand because the totality of the circumstances indicate that the amount in controversy exceeds the jurisdictional minimum.

II. STATEMENT OF THE CASE

Plaintiffs commenced this action in the Circuit Court of Wetzel County, West Virginia, on or about November 6, 2009. Previously, on December 9, 2009, Nationwide removed the underlying state case to federal court pursuant to 28 U.S.C. § 1332. Plaintiffs moved to remand on the basis that Nationwide had failed to prove that the amount in controversy was in excess of $75,000, exclusive of interests and costs. The Court agreed and, by Order dated March 10, 2010, remanded the case to the Circuit Court of Wetzel County, West Virginia. In that Order, the Court found that Nationwide had not met its burden of proof, did not offer "competent proof or tangible evidence" that the amount controversy exceeded the jurisdictional requirement, and found that Nationwide had "not shown by a preponderance of the evidence that the plaintiffs will recover damages in excess of the jurisdictional minimum." Order dated March 10, 2010 in Notice of Removal, Exhibit 4 at p. 5. The Court, however, expressly noted that a second notice of removal could be filed "upon receipt of an amended complaint or some 'other paper' from which it may first be ascertained that the case is one which has become removable." *Id.* at 6 (*citing* 28 U.S.C. § 1446(b)).

[1] The Notice of Removal inadvertently noted that the Offer of Judgment was sent via certified mail.

On September 15, 2010, after receiving Plaintiffs' medical records and medical specials through Plaintiffs' written discovery responses and the use of Plaintiffs' medical authorizations, and evaluating those records, Nationwide served via U.S. mail an Offer of Judgment on Plaintiffs for $100,000.00. Plaintiffs were informed by cover letter that, pursuant to Rule 68, they had ten (10) days within which to accept the offer. Following the expiration of the ten (10) day period, Nationwide timely removed the action to this Court pursuant to 28 U.S.C. §§ 1441 and 1446(b).

The removal is based upon diversity of citizenship jurisdiction conferred by 28 U.S.C. § 1332 as this is an action between citizens of different states and the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. Moreover, pursuant to 28 U.S.C. § 1446(b), this removal is timely, filed within thirty (30) days after Nationwide's Offer of Judgment expired, which constitutes as an "other paper" from which it may first be ascertained that the case is one which has become removable.

Plaintiffs have not challenged Nationwide's assertion that this is an action between citizens of different states. Plaintiffs also do not challenge the allegation that they refused Nationwide's $100,000 Offer of Judgment, clearly signaling that their action seeks more than the jurisdictional minimum. Instead, Plaintiffs argue that the Court should grant their motion to remand because (1) an Offer of Judgment does not qualify as an "other paper" under 28 U.S.C. § 1446(b) and (2) Federal Rule of Civil Procedure 68 precludes the use of an Offer of Judgment in determining amount in controversy for purpose of removal. Other courts have rejected both arguments.

III. DISCUSSION

The Fourth Circuit has recently held that 28 U.S.C. Section 1446(a) requires that a notice of removal contain only a "'short and plain statement of the grounds for removal'" and that it be "'signed pursuant to Rule 11.'" *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008). Accordingly, the Court concluded that a notice of removal need not meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint. *Id.* at 200. Moreover, on a challenge of jurisdictional allegations, the removing parties' burden of proof is no greater than is required to establish federal jurisdiction as alleged in a complaint. *Id.* The court should apply a "preponderance of the evidence" standard in determining whether a defendant has met the required burden in establishing removal. *Allman v. Chancellor Health Partners*, No. 5:08CV155, 2009 WL 514086, *1 (N.D.W. Va. Mar. 2, 2009). In making that decision, "the court is not required 'to leave common sense behind' . . . . When no specific amount of damages is set forth in the complaint, the Court may consider the entire record before it and may conduct its own independent inquiry . . . ." *Id.* (citation omitted).

A defendant may seek a second removal so long as it is based on different grounds. *Cain v. CVS Pharmacy, Inc.*, No. 5:08CV79, 2009 WL 539975, at *2 (N.D.W. Va. Mar. 4, 2009). "Different grounds" can be either a different set of facts that support a new ground for removal, or new facts that support the same theory of removal. *Id.*

Pursuant to 28 U.S.C. § 1446(b), "a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or otherwise has become removable . . . ." The Fourth Circuit has held that the "motion, order or other paper" under Section 1446(b) "is broad enough to include *any information* received by the defendant, 'whether communicated in a formal or informal manner.'" *Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 755 (4th Cir. 1996)(*citing Broderick v. Dellasandro*, 859 F. Supp. 176, 178 (E.D. Pa. 1994)(*quoting* 14A Wright, Miller, and Cooper, *Federal Practice and Procedure*, § 3732 at 520))(emphasis added).

> Thus, [Section 1446(b)] expressly encompasses the case in which the actual facts supporting federal jurisdiction remain unaltered from the initial pleading, but their existence has *manifested* only by later papers, revealing the grounds for removal for the first time. . . .
>
> Given this interpretation, we will not require courts to inquire into the subjective knowledge of the defendant, an inquiry that could degenerate into a mini-trial regarding who knew what and when. Rather, we will allow the court to rely on the face of the initial pleading and on the documents exchanged in the case by the parties to determine when the defendant had notice of the grounds for removal, requiring that those grounds be apparent within the four corners of the initial pleading or subsequent paper.

Lovern v. Gen. Motors Corp., 121 F.3d 160, 162 (4th Cir. 1997)(emphasis in original).

Moreover, "[e]xamples of documents recognized by courts as 'other paper' under § 1446(b) include 'requests for admissions, deposition testimony, *settlement offers*, answers to interrogatories, briefs, and product identification documents given in discovery.'" *Bowyer v. Countrywide Home Loans Servicing, LP*, No. 5:09CV402, 2009 WL 2599307 (S.D.W. Va. Aug. 21, 2009)(unpublished)(citation omitted)(emphasis added). While the Fourth Circuit has not directly addressed the issue of whether an offer of judgment is considered an "other paper" under § 1446(b), courts in the Fourth Circuit have held that "a written offer of settlement constitutes 'other paper.'" *Ford-Fischer v. Stone*, No. 2:06CV575, 2007 WL 190153, at *5 (E.D. Va. Jan. 22, 2007)(*citing Rodgers v. Nw. Mut. Life Ins. Co.*, 952 F. Supp. 325, 327 (W.D. Va. 1997))(unpublished)(holding that plaintiff's letter which set forth a settlement demand in excess of the amount in controversy requirement constituted an "other paper" under the removal statute). Accordingly, an offer of judgment should likewise be held to constitute an "other paper" because "[a]n offer of judgment is merely a formal settlement offer." *Vermande v. Hyundai Motor Am., Inc.*, 352 F. Supp. 2d 195, 202 n.5 (D. Conn. 2004)(*citing* Fed.R.Evid. 408, Advisory Comm. Note (stating that the "same policy underlies" Rule 408 as underlies Rule 68)). *See also Henderson v. Sterling, Inc.*, 139 F.3d 889, *4 (4th Cir. 1998)(unpublished)("It is generally agreed that, since Rule 68 offers of judgment are basically offers of settlement, they should be interpreted according to basic principles of contract law.").[2]

"Other paper" is, therefore, clearly broad enough to encompass the manifest fact in this case that, after Plaintiffs received Nationwide's Offer of Judgment in excess of $75,000 and refused to accept it within the ten-day period, the amount in controversy was beyond a preponderance of the evidence greater than the jurisdictional minimum. In fact, Moore's Federal Practice specifically indicates that "'other paper' includes . . . offers of judgment specifying an amount in excess of the jurisdictional minimum" for determining removal jurisdiction under Section 1446(b). *Id.* at § 107.03[3](e). In support of that proposition, Moore's cites *In re Willis*, 228 F.3d 896, 897 (8th Cir. 2000). In that case, after an initial round of discovery wherein the defendant filed an offer of judgment for $75,001 that was not accepted, the defendant removed the case to federal court pursuant to § 1446(b), asserting jurisdiction under 28 U.S.C. § 1332(a). Based on those facts, the Eighth Circuit reversed the district court's determination that the removal was filed after the thirty-day period prescribed by § 1446(b) and granted the defendant's petition for mandamus to have the case reinstated on the federal court's docket. *Id.*

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[2] Plaintiffs cite only to *Humphries v. Anderson Trucking Service, Inc.*, No. 10-194-CG-N, 2010 WL 2898317 (S.D. Ala. June 29, 2010), to support their contention that offers of judgment can never be used in determining amount in controversy. That citation, however, is not to an opinion by a district court, but rather to a Report and Recommendation from a magistrate judge, to which no objection was made and which was only summarily adopted by the district court. *See Humphries v. Anderson Trucking Service, Inc.*, No. 10-194-CG-N , 2010 WL 2884863 (S.D. Ala. Jul. 14, 2010). *Humphries* is neither persuasive authority, nor has its holding excluding clear and manifest evidence as to the amount in controversy been followed by any court in the Fourth Circuit.

Similarly, after engaging in discovery and receiving Plaintiffs' medical records and medical specials, Nationwide made an offer of judgment to Plaintiffs in the amount of $100,000.00. The offer of judgment was sent via U.S. mail and Plaintiffs do not contest that they received the offer. Therefore, after receiving the information that Plaintiffs refused to accept the written settlement offer, which was far in excess of the jurisdictional minimum, it was clearly manifest to Nationwide that the amount in controversy was in excess of the jurisdictional minimum and, accordingly, Nationwide filed its notice of removal pursuant to § 1446(b) within thirty days.

Contrary to Plaintiffs' argument, Rule 68 does not prohibit the use of an offer of judgment by the Court in determining jurisdictional questions. The Sixth Circuit has already rejected this argument. In *O'Brien v. Ed Donnelly Enterprises*, 575 F.3d 567, 574 (6th Cir. 2009), the plaintiffs argued that the district court abused its discretion in considering an offer of judgment when it reviewed the defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(6), because the language of the rule states that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs." The Sixth Circuit expressly noted, however, that while "an offer of judgment cannot be used to support or challenge the merits of a claim and to thereby influence the trier of fact," it may be used to determine subject matter jurisdiction. *Id.*

Offers of compromise are governed by Rule of Evidence 408, which precludes admission "when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement of contradiction."

Fed.R.Evid. 408(a). The rule, however, does not prohibit use of such evidence for other reasons not specifically enumerated in subsection (a), such as "proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution." Rule 408(b). Moreover, it should be noted that the same policy underlying the prohibition in Rule 408 from presenting a settlement offer to the trier of fact is the same policy underlying the prohibition in Rule of Evidence 68. *See* Fed.R.Evid. 408, Advisory Comm. Note.

Similarly, Nationwide does not assert that its Offer of Judgment proves the exact amount of liability in this case, and it does not present it for that purpose. Rather, Nationwide presents the uncontested fact that Nationwide evaluated the new medical records and increased medical specials it received through Plaintiffs' written discovery and extended an Offer of Judgment in the amount of $100,000.00, which Plaintiffs rejected, to prove by a preponderance of the evidence that that the amount in controversy exceeds the jurisdictional limit. *See Banger ex rel. Freeman v. Magnolia Nursing Home, L.P.*, 234 F. Supp. 2d 633, 636 (S.D. Miss. 2002)("Plaintiffs' refusal to accept the Offer of Judgment [for $75,000, exclusive of interest and costs,] is probative that Plaintiffs seek to recover an amount in excess of the Offer of Judgment.").

In this case, there can be no doubt that, by a preponderance of the evidence, Nationwide has shown that Plaintiffs are seeking to recover more than $75,000, since they rejected a pre-removal Offer of Judgment in the amount of $100,000. As such, Nationwide has met the burden of proof to establish that the Plaintiffs' claims exceed the jurisdictional threshold and, pursuant to 28 U.S.C. § 1332, federal jurisdiction is proper. *See Allman*, 2009 WL 514086, at *1.

IV. REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule of Civil Procedure 78.01, Nationwide requests oral argument on the Plaintiffs' motion to remand.

V. CONCLUSION

For all of the foregoing reasons, this Court should deny the motion to remand.

Dated this 15th day of November, 2010.

/s/ Amy M. Smith

Amy M. Smith (W. Va. Bar #6454)
400 White Oaks Boulevard
Bridgeport, WV 26330
(304) 933-8137 (direct dial)
(304) 933-8183 (facsimile)

Melanie Morgan Norris (WV Bar #8581)
1233 Main Street, Suite 3000
P.O. Box 751
Wheeling, WV 26003
(304) 231-0460 (direct dial)
(304) 233-0014 (facsimile)

Laurie C. Barbe (WV Bar #5504)
P.O. Box 1616
Morgantown, WV 26507
(304) 598-8113 (direct dial)
(304) 626-4733 (facsimile)

STEPTOE & JOHNSON PLLC
of Counsel

Counsel for
Nationwide Mutual Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2010, I filed the foregoing "Response to Plaintiff's Motion to Remand and Request for Oral Argument" with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Scott S. Blass, Esq.
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003
Counsel for Plaintiffs

/s/ Amy M. Smith